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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-150

FRANK LEO VUCI,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MC PHERSON
Attorney at Law
419 Carondelet Street
New Orleans, Louisiana
70130

MILTON P. MASINTER
Attorney at Law
550 S. Broad Street
New Orleans, Louisiana
70119

Attorneys for Petitioner

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The petitioner, FRANK LEO VUCI, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on April 19, 1973, rehearing denied on June 18, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, p. 43. The opinion of that Court denying petitioner's application for rehearing and for rehearing *en banc* is unreported and appears at Appendix B, *infra*, p. 44. The opinion of the District Court, denying petitioner's Motion to Vacate Judgment and to Dismiss Indictment or to Correct Illegal Sentence, is unreported and appears at Appendix C, *infra*, pp. 45-51.

JURISDICTION

The order or judgment of the United States Court of Appeals was entered on April 19, 1973. See Appendix A, *infra*. Thereafter, petitioner made timely application for rehearing and for rehearing *en banc*, which relief was denied on June 18, 1973. This petition for certiorari is filed less than 30 days from the date

rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the imposition of a sentence of five years and imprisonment and a $10,000 fine is grossly disproportionate to the offenses charged against petitioner, *i.e.*, four counts of violating 18 U.S.C. § 1952 by using or causing to be used facilities in interstate commerce to replenish a supply of bingo cards and other equipment used in a gambling business which is illegal under Louisiana law (La.R.S. 14:90) but subject only to a maximum penalty of six (6) months imprisonment and a fine of $500 for the complete operation of such a business?

2. If so, to what relief is petitioner entitled?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, Cruel and Unusual Punishment Clause; the penal provisions of 18 U.S.C. § 1952; and the provisions of La.R.S. 14:90.

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18, United States Code, § 1952 (in relevant part):

> (a) Whoever travels in interstate * * * commerce or uses any facility in interstate commerce, including the mail, with intent to—
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs * * * (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * *.

Title 14, Louisiana Revised Statutes of 1950, Article 90 (La.R.S. 14:90):

Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both. (Amended by Acts 1968, No. 647, § 1, emerg. eff.

July 20, 1968, at 1:30 P.M.)

STATEMENT OF THE CASE

The facts relevant to the issue here presented are matters of record and are not in dispute. The only dispute arises over the legal significance of the facts.

Petitioner was tried and convicted on all counts of an indictment charging a conspiracy to violate 18 U.S.C. § 1952 and three substantive counts of violating 18 U.S.C. §§ 1952 and 2. Petitioner and a co-defendant owned and operated the Club Louisianne in Port Allen, Louisiana, which regularly conducted bingo games. The substantive counts arose out of business transactions with the Bingo King Company of Englewood, Colorado—*viz.*, purchases of equipment and supplies for the conducting of the bingo games at the Club Louisianne. The conspiracy count arose from the joint participation of petitioner and his partner in the business enterprise and their dealings

with one Haskell F. Jones[1].

Louisiana regards the business of operating bingo games as offensive and proscribes the same in La.R.S. 14:90, prescribing a maximum penalty therefor of a fine of $500 and/or six months imprisonment. By virtue of the procurement of bingo supplies—a necessary step in the conduct of the illegal gambling business—from out of state, 18 U.S.C. § 1952 became operable. Had the bingo cards and equipment been purchased locally, the federal offense would not have occurred. By virtue of the element of interstate commerce, *i.e.*, interstate telephone communications and letters to the Bingo King Company and use of common carriers to transport supplies and equipment in interstate commerce, a fine of $10,000 and imprisonment for five years was inflicted on petitioner.

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1. Mr. Haskell F. Jones was acquitted on all counts by the jury.

Following the unsuccessful appeal of his conviction and his application to this Court for a writ of certiorari, petitioner retained undersigned counsel who moved the trial court to vacate the judgment and dismiss the indictment or, alternatively, to correct the sentence by adjusting it within the permissible range of punishment prescribed for the underlying State offense. The Trial Court denied that motion; petitioner appealed; the Court of Appeals affirmed the judgment of the Trial Court and thereafter denied petitions for rehearing and for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the principle enunciated by this Court in *Weems v. United States* that a punishment which is grossly disproportionate to the offense charged is cruel and unusual and that a statute authorizing such a punishment is void as it conflicts with the guaranties of the Eighth Amendment to the United States Constitution that no punishments of such nature shall be inflicted.

In *O'Neil v. Vermont*, 144 U.S. 323

(1892), this Court was asked to hold a sentence of fifty-four years at hard labor, imposed for 307 illegal sales of liquor, to be a cruel and unusual punishment which violated the Fourteenth Amendment to the United States Constitution. The provisions of the Fourteenth Amendment, rather than the Eighth Amendment, were at issue there because the matter involved a State prosecution. The jurisprudence at that time had not evolved to the point, now clearly reached[2], which enforces against the States the mandates of the Eighth Amendment. This Court declined to reach the merits of the *O'Neil* case because the record was not viewed as presenting a Federal question. 144 U.S., at 331-332. Significantly, the Supreme Court of Vermont, in its opinion in the *O'Neil* case, quoted with emphasis at

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2. *E.g., Robinson v. California,* 370 U.S. 660 (1962); *Furman v. Georgia,* 408 U.S. 238 (1972).

page 331 of 144 U.S., said:

> " * * * The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material on this question. If the penalty were unreasonably severe for a *single* offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed."

This Court noted that it would not then reach consideration of the question of cruel and unusual punishment "because as a Federal question, it is not assigned as error, nor even suggested in the brief of the plaintiff in error; * * *. Moreover, as a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States. *Pervear v. The Commonwealth*, 5 Wall. [72 U.S.] 475." 144 U.S., at 331-

332. Three Justices of this Court dissented from the dismissal of the writ of error. Mr. Justice Harlan, with the express concurrence of Mr. Justice Brewer, wrote (144 U.S., at 371):

> The judgment before us by which the defendant is confined at hard labor in a House of Correction for the term of 19,914 days, or fifty-four years and two hundred and four days, inflicts punishment, which, *in view of the character of the offences committed*, must be deemed cruel and unusual.
>
> Without noticing other questions, I am of opinion that upon the ground last stated the judgment should be reversed.

Messrs. Justices Harlan and Brewer also "fully concur[red]" with Mr. Justice Field's position that the ban on cruel and unusual punishments was equally applicable against the States and the Federal Government since

adoption of the Fourteenth Amendment. 144 U.S., at 370. Mr. Justice Field's position was eloquently summarized in these words spoken in dissent from the dismissal of the writ of error (144 U.S., at 339-340):

> The inhibition [of the Cruel and Unusual Punishment Clause of the Constitution] is directed, not only against punishments of the character mentioned [he had previously specified certain forms of punishment which inflict torture], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. * * *.

As noted by Mr. Justice Marshall, concurring in *Furman v. Georgia*, 408 U.S. 238, 324 (1972), "In *Howard v. Fleming*, 191 U.S. 126 (1903), the Court, in essence, followed the approach advocated by the dissenters in *O'Neil*. In rejecting the claim that 10-year sentences for conspiracy to defraud were

cruel and unusual, the Court (*per* Mr. Justice Brewer) considered the nature of the crime, the purpose of the law, and the length of the sentence imposed." Significantly, Mr. Justice Brewer was a dissenter in the *O'Neil* case. This indicates a turn in the law—the first application of the *O'Neil* dissenters' position in an Opinion of the Court.

Outright application of the dissenters' position by a majority of this Court was not long awaited. In *Weems v. United States*, 217 U.S. 349 (1910), this Court squarely applied the reasoning of the *O'Neil* dissenters and, in striking down a statute because it authorized an exceptionally severe penalty for a relatively minor offense, said (217 U.S., at 366-367):

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens

from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and *proportioned* to offense. (Emphasis added.)

This Court rhetorically asked whether the "precept of justice that punishment for crime should be graduated and proportioned to offense" is "also a precept of the fundamental law." It answered (217 U.S., at 368):

> What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like. *McDonald v. Commonwealth*, 173 Mass. 322. The court, however, in that case conceded the possibility "that imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and

unusual punishment." * * *.

Of the specific sentence imposed, it said (217 U.S., at 377):

> It is *cruel in its excess of imprisonment* and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both *on account of their degree* and kind. * * * (Emphasis added.)

Thus, this Court alternatively held that a sentence of such length as to be greatly disproportionate to the offense charged, or one required to be served under such onerous conditions as would be regarded inhuman and barbarous, torture and the like, are condemned by the constitutional proscription in the Eighth Amendment against infliction of cruel and unusual punishments.

The *Weems* case was decided on the cruel and unusual punishment provision of

Philippine Bill of Rights, rather than the Eighth Amendment. This Court, however, made it clear that its pronouncements expository of the Philippine provision were equally applicable to cases arising under the Eighth Amendment. This Court noted that "the provision of the Philippine Bill of Rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States, *and must have the same meaning.*" 217 U.S., at 367. (Emphasis added.) *A fortiori*, the Eighth Amendment bans greatly excessive or disproportionate sentences because they are cruel and unusual.

Following the direct application of the *O'Neil* dissenters' rationale in *Weems*, the next case to come before this Court urging application of that rationale was *Pico v. United States*, 228 U.S. 225 (1913), also a case from the Philippine Islands in which a sentence of *cadena temporal*[3], the

3. Footnote at bottom of following page.

accessories provided by law,[4] and to indemnification of the heirs to the deceased

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3. In *Weems*, this Court described *cadena temporal*: " * * * 'those sentenced to *cadena temporal* * * * shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.'" 217 U.S., at 364.

4. The accessory penalties provided by law were "(1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life." 217 U.S., at 364. More particularly, these additional punishments comprised (217 U.S., at 364-365):

> "* * * Civil interdiction shall deprive the person punished, as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*. Those cases are excepted in which the laws explicitly limit its effects.
>
> "* * * Subjection to the surveillance of the authorities imposes the following obligations on the persons punished:
>
> "1. That of fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority, in writing.
> "2. To observe the rules of inspection prescribed.
> (Continued at bottom of following page.)

victim of the crime of "murder, with the qualifying circumstance of *alevosia* (treachery)." 228 U.S., at 229. The Solicitor General showed this Court, in *Pico*, that the odious accessories to the sentence of *cadena temporal*, which this Court denounced in *Weems*, were no longer in use in the Philippine Islands. Significantly, in *Pico*, the Solicitor General argued that the punishment imposed in that case was fairly proportioned to the crime committed. *See* the digest of briefs, 228 U.S., at 227-228. In apparent agreement with the Solicitor General, the assignment

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4 (Cont'd): "3. To adopt some trade, art, industry, or profession should he not have known means of subsistence of his own.

"Whenever a person punished is placed under the surveillance of the authorities, notice thereof shall be given to the government and to the governor general."

The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, *etc.*, and the loss of retirement pay, *etc.*

of error that his sentence was greatly disproportioned to the crime charged, *Weems v. United States, supra,* was abandoned in open Court and this Court declined to consider it. 228 U.S., at 232.

Since *Weems,* this Court has not applied its proportionality doctrine, although much reference has been made to the *Weems* case in virtually every case brought before and decided by this Court on the issue of cruel and unusual punishment.

In *Rudolph v. Alabama,* 375 U.S. 889 (1963), and in *Snider v. Cunningham,* 375 U. S. 889 (1963), Messrs. Justices GOLDBERG, DOUGLAS and BRENNAN dissented from the denial of a writ of certiorari. There the issue was whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who had neither taken nor endangered human life. Mr. Justice GOLDBERG, writing for the

dissenters, felt that three questions posed by that case were relevant and worthy of argument and consideration. The second of these posed the issue in the express terms of the proportionality theory as it was declared in *Weems v. United States, supra,* the application of which is sought herein:

> (2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive * * * severity are greatly disproportioned to the offenses charged?"

Of course, the denial of certiorari in those cases cannot be regarded as having overruled *Weems, sub silentio.*[5]

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5. All the denial of a writ of certiorari means is that fewer than four members of this Court voted to hear the case. "[S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. * * *." *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 915 (1950)(FRANKFURTER, J., *concurring*).

Weems' proportionality doctrine is cited in numerous opinions of this Court, some of them quite recent.

In *Lambert v. California*, 355 U.S. 225, 231 (1957), Mr. Justice FRANKFURTER wrote in dissent:

> [A] cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment.[6]

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6. Although Mr. Justice FRANKFURTER did not cite *Weems* as authority for this statement, it is clear that he drew on its authority for the statement for *Weems* and *Howard v. Fleming*, both *supra*, are the only cases which had then looked to the relation between the offense and the sanction for its disobedience to determine whether the punishment inflicted was a cruel and unusual one. That Mr. Justice FRANKFURTER's statement appears in dissent does not indicate the majority disagreed. Rather, the case was decided by the majority on a totally different
(footnote continued on following page)

In the plurality opinion of the Chief Justice and Messrs. Justices BLACK, DOUGLAS and WHITTAKER, in *Trop v. Dulles*, 356 U.S. 86, 100 (1958), the following statement of Eighth Amendment principles, including the proportionality doctrine, appears:

> While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed *depending on the enormity of the crime* * * *. (Emphasis added.)[7]

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point from which he dissented. This Court need look only to Mr. Justice FRANKFURTER's separate concurrence in *Adamson v. California*, 332 U.S. 46, 59 *et seq.* (1947) *(passim)*, to see that he did not support the "incorporationist" view of the Fourteenth Amendment. His special concurrence, then, indicates that he felt quite strongly that a penal sanction which is greatly disproportionate to the conduct deemed offensive "offend[s] those canons of decency and fairness which express the notions of justice * * *(332 U.S., at 67-68)."

7. *Trop v. Dulles* has been viewed as holding that the punishment there involved was too enormous for the offensive conduct there involved.

In *Powell v. Texas*, 392 U.S. 514 (1968), this Court unanimously recognized the validity of the proportionality doctrine of Eighth Amendment jurisprudence. The majority stated (392 U.S., at 532):

> the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. See, *e.g.*, *Trop v. Dulles*, [*supra*]; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Weems v. United States*, [*supra*]. *See* generally, Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

The dissenters stated (392 U.S., at 569):

> "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." *Robinson v. California*, 370 U.S. 660, 676

(DOUGLAS, J., *concurring*).[8]

Several of the members of this Court recently expressed recognition of the proportionality concept of Eighth Amendment jurisprudence in the recent case, *Furman v. Georgia*, 408 U.S. 238 (1972).

While Mr. Justice DOUGLAS' separate opinion in *Furman* deals primarily with the inequality of treatment on account of race, color, political conscience, sccial standing, or other identifiable classification, the historical information relative to the meaning of the English Bill of Rights' Cruel and Unusual Punishment Clause, the progenitor of the Eighth Amendment clause, equally supports the view that the People of England, when limiting sovereign power,

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8. Mr. Justice DOUGLAS' statement in *Robinson* clearly approves and applies the proportionality doctrine. See, also, Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, *op. cit.*, *supra*, 79 Harv. L. Rev., at 635, for similar language used in reference to the proportionality doctrine under Eighth Amendment jurisprudence.

sought to prevent infliction of excessive and disproportionate punishments for minor offenses as well as to prevent cruel means of inflicting death for major offenses. Mr. Justice DOUGLAS' "equal protection" approach in the *Furman* case should not be construed to indicate a retreat from the proportionality doctrine stated in his concurring opinion in the *Robinson* case.

Messrs. Justices BRENNAN and MARSHALL separately distilled four principles from the previous opinions of this Court to be used in determining whether a punishment is cruel and unusual within the meaning and intendment of the Eighth Amendment's proscriptions. Each regarded the proportionality doctrine, *i.e.*, the proscription against excessiveness in punishment, to be a viable constitutional precept. 408 U.S., at 273, 279-281 (BRENNAN, J., *concurring*); *id.*, at 331-332, 358-359 (MARSHALL, J., *concurring*).

Mr. Justice BRENNAN stated, "we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle," 408 U.S., at 281,[9] but Mr. Justice MARSHALL, viewing the independence of each of the same four principles, said, "The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one of four distinct reasons." 408 U.S., at 330.

There is little doubt from the foregoing analysis that the proportionality theory of *Weems v. United States* is still good law. In spite of this, the opinions of the Courts below do not treat petitioner's claims made under its authority.[10]

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9. Although petitioner's claims deal chiefly with the excessiveness of punishment inflicted on him for the offenses charged, other of the four principles defined in the past opinions of this Court, summarized in the separate concurrences of Mr. Justice BRENNAN and Mr. Justice MARSHALL in the *Furman* case, coalesce to show that under either, Justice BRENNAN's or Justice MARSHALL's views, the punishment imposed on petitioner is cruel and unusual. The sentence *is* excessive.

10. The District Court did not even cite *Weems*.

The principle on which petitioner relies herein, and which he unsuccessfully urged in both Courts below, is, as shown by the foregoing, a viable constitutional precept. The question now turns to whether that principle is applicable to the facts of the instant case.

Mr. Justice MARSHALL, concurring in *Furman v. Georgia, supra,* at 324, accurately noted that, in *Howard v. Fleming,* 191 U.S. 126 (1903), the first case in which a majority of this Court followed the approach of the *O'Neil* dissenters, "considered the nature of the crime, the purpose of the law, and the length of the sentence imposed" in order to ascertain whether the sentence there amounted to a cruel and unusual punishment. In *Weems v. United States, supra,* at 380 *et seq.,* this Court looked to the penalties permitted under Federal law for guidance in determining whether the punishment inflicted upon the peti-

tioner there was cruel and unusual.[11]

Before moving to the discussion of the above mentioned considerations, petitioner feels it appropriate to here dispel one misconception of the Trial Court which was apparently affirmed on appeal. The Trial Court, totally disregarding petitioner's arguments that the State penalty provisions were relevant to the maximum penalty under Federal law, noted that it imposed the maximum sentence on only one count of the four-count indictment, "thus, in effect, sentencing this defendant to only one-fourth of the sentence authorized by [18 U.S.C. §§ 1952 and 371]." Appendix C, *infra*, p. 50. This Court noted in *Weems*, *supra*, at 365,

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11. Other cases more recently before this Court have looked to "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, *supra*, at 101, but these cases have looked to the *type* and *not the amount* of punishment inflicted. The penalty imposed here, while not unusual, being within the range of punishments imposed by Courts of criminal jurisdiction daily, is disproportionate to the conduct which is being punished. *Accord*, *Weems v. United States*, *supra*; *Robinson v. California*, *supra*.

that when the law authorizes the infliction of an excessive punishment, then the law cannot square with the Eighth Amendment's mandate. Moreover, there comes a point when the cumulation of punishment offends the Eighth Amendment. *E.g.*, see *O'Neil v. Vermont, supra,* at 340,[12] 364[13] (FIELDS, J., *dissenting*). The cruel and unusual nature

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12. "The State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass of liquor and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration." 144 U.S., at 340.

13. "An imprisonment at hard labor for a few days or weeks for a minor offence may be within the direction of a humane government—but if the minor offences are numerous no authority exists to convert the imprisonment into one of perpetual confinement at hard labor such as would be appropriate only for felonies of an atrocious nature. It is against the excessive severity of the punishment, as applied to the offences for which it is inflicted, that the inhibition is directed." 144 U.S., at 364.

of a punishment because of its excessiveness in relation to the offense for which it is imposed, therefore cannot be excused because multiple offenses are involved. Additionally, all the acts here relevant were performed in the conduct of petitioner's illegal bingo game. The State of Louisiana has seen fit to punish only the business of gambling and does not punish each individual act of gambling. The Federal statute being dependent on the State gambling statute to confer jurisdiction on the Trial Courts of the United States, the cumulative acts of operating a business should no more be separated and separately punished than should the number of drops in a glass of liquor be each measured and separately punished. *See* note 12, *supra*.

Taking this Court's example in *Weems v. United States* and looking to similar laws for appropriate degrees of punishment,[14]

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14. Footnote is on following page.

petitioner submits that this Court need look no further than Louisiana law[15] for a determination of the appropriate range of punishment for the offense charged.

In 1968, this Court decided *Duncan v. Louisiana*, 391 U.S. 145, 194, *reh. den.* 392 U.S. 947 (1968), and then declared that "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty

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14. Petitioner does not dispute the power of the Federal Government to impose *some* punishment for the use of interstate facilities to violate the State of Louisiana's gambling law. Petitioner's dispute lies only with the amount of punishment inflicted on him in view of the conduct involved, *i.e.*, he submits the permissible punishment under 18 U.S.C. §§ 371 and 1952 exceeds that which is proportionate to the mere use of interstate facilities. *Cf. Furman v. Georgia*, 408 U.S., at 344 (MARSHALL, J., *concurring*). See, also, *Robinson v. California*, *supra*, at 667 (DOUGLAS, J., *concurring*).

15. Congress looks to the law of Louisiana to fix criminal liability under 18 U.S.C. § 1952. What might be a crime in one state is not necessarily a crime in another. Louisiana does not make criminal the simple act of gambling, Op.La.Atty.Gen. 1948-50, p. 71, while it is in many jurisdictions. To overlook the nature of the offense, as viewed by Louisiana, is to disregard an essential element in the test of *Howard v. Fleming*, *supra*.

offenses." 391 U.S., at 159. The maximum sentence for gambling then in effect in Louisiana was one year of imprisonment and a $500 fine. La.Acts 1942, No. 43, § 1, Art. 90, La.R.S. 14:90. Following this Court's declaration in *Duncan*, the Louisiana Legislature passed emergency legislation which reduced the penalties of many offenses which Louisiana regarded to be so "petty" as not to require a jury trial. Acts 1968, No. 647, § 1, emerg. effective July 20, 1968, at 1:30 P.M. Since the Federal statute, 18 U.S.C. § 1952, looks to Louisiana law for a determination of criminal liability, it should likewise look to this State's determination of the relative worth of the offense and be bound by Louisiana's determination of the maximum allowable penalty. The "nature of the crime" [*Furman v. Georgia, supra,* at 324 (MARSHALL, J., *concurring*), summarizing this Court's action in *Howard v. Fleming, supra*] is "petty" in Louisiana's view. It is incon-

sistent to look to Louisiana's view of criminality and to disregard its view of the nature of the offense. Just as the basic offense of gambling is petty, the use of interstate facilities in connection with that offense must likewise be regarded as "petty." The imposition of a sentence of five years and a $10,000 fine[16] is grossly disproportionate to that offense. The first and third elements of the *Howard v. Fleming* test of a cruel and unusual punishment, summarized by Mr. Justice MARSHALL in *Furman v. Georgia, supra,* at 324, are thus satisfied. The remaining element under that test, "the purpose of the law" *(ibid.),* also favors a determination that the punishment inflicted on petitioner is cruel and unusual.

The "purpose of the law,"[17] as reflected by the legislative history reported at 1961

16. The sentence here inflicted on petitioner is ten times the maximum imprisonment and twenty times the maximum fine permissible under State law for the basic offense of gambling as defined in Louisiana law.

17. 18 U.S.C. § 1952.

U.S. Code Cong. & Adm. News, pp. 2664-2667, was to curb the interstate activities of organized crime and to "assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling * * *." *Id.*, at 2665. As reflected by the testimony in this case, petitioner simply operated a bingo game. There is neither an allegation or even the slightest indication that petitioner's activites were in any manner connected with organized crime. As previously shown, Louisiana punishes only the business of gambling, not the individual acts of gambling. When comparing the State and Federal statutes, the only significant difference between them is that the Federal statute requires the additional showing that interstate commerce was involved. Louisiana, like the United States, deals only with the gambling business in their respective statutes. All of the types of transactions described in 18 U.S.C. § 1952(a) are mere

incidents of the operation of a gambling business. It is perhaps most significant that Congress itself decided not to punish the mere use of facilities in interstate commerce by organized criminals; it required in 18 U.S.C. § 1952(a) that, after the use of the facilities in interstate commerce there be some continued conduct of the illegal gambling operation. So it is clearly shown that the sentence permitted to be imposed under 18 U.S.C. § 1952 is supposed to be that which is proportionate for the use of interstate commerce facilities and the violation of State law. Since the maximum allowable penalty for violation of the State law is only one-tenth of the imprisonment permissibly inflicted under 18 U.S.C. § 1952 and it is only one-twentieth of the fine permissibly imposed thereunder, the remaining parts of the sentence imposed on petitioner were for the use of interstate commerce facilities. By no view can this

difference in punishment be proportionate to the offense of using interstate commerce facilities. This grossly exceeds that which is required, hence permissible, to "assist local law enforcement."

"The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'" *Furman v. Georgia, supra,* at 332 (MARSHALL, J., *concurring*). See, also, *Weems v. United States, supra,* 217 U.S., at 371; *O'Neil v. Vermont, supra,* at 340 (FIELD, J., *dissenting*). The 20:1 fine and 10:1 imprisonment ratio permitted by 18 U.S.C. § 1952, and inflicted on petitioner in this case, is, on all accounts, cruel and unusual because of its excessiveness for the use of interstate commerce facilities. The sentence imposed on petitioner is constitutionally voidable.

The judgments of the Court of Appeals and of the District Court, refusing to void the sentence imposed on petitioner, clearly

conflicts with the jurisprudence of this Court enunciating the proportionality doctrine under the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution, as well as the many separate opinions of Justices of this Court which have indicated a continuing vitality in that constitutional doctrine. This Court should therefore grant certiorari in this case to require the judgments of the Courts below to conform with the constitutional jurisprudence of this Court.

2. This case presents an important question of Federal law, recurring in nature, and not a mere isolated case of misapplication of this Court's previous Eighth Amendment opinions, and, the issues having been clearly presented to the Courts below without avail, this Court should grant certiorari to settle the issue of the appropriate application of the proportionality doctrine in cases of this nature.

In *United States v. Brennan*, 394 F.2d 151 (2 Cir. 1968), and again in *United States v. Zirpolo*, 288 F.Supp. 993 (D.N.J., 1968), lower Federal courts have decided that "due process" is not violated by converting a

state misdemeanor into a federal felony by operation of 18 U.S.C. § 1952. These cases did not present the *Weems* proportionality argument which petitioner has pursued from the District Court, throughout his post-conviction appeal, to this Court. The vague "due process" ground is the inappropriate approach to the issue presented by the above-cited cases, yet, as a result of their decision on that ground, those cases are likely to be followed in total disregard of the applicability of the proportionality doctrine.[18]

In *Weems v. United States, supra,* this Court said "it is a precept of justice that punishment for crime should be *graduated* and proportioned to offense." 217 U.S., at 367. This Court went on to hold that this is a precept of the fundamental law enshrined in the Eighth Amendment to the Constitution. 217 U.S., at 367 *et seq.*

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18. The Court below rendered no opinion on the Eighth Amendment theory of petitioner. See Appendix A, *infra.*

The objection voiced in *Brennan* and *Zirpolo* was actually that 18 U.S.C. § 1952 is not properly graduated in its range of punishments so as to distinguish and differently punish interstate travel to commit a misdemeanor and such travel to commit a felony. This is an Eighth Amendment ground under *Weems*, not the vague due process ground on which those cases were decided.

It cannot be said that Congress does not know how to graduate a punishment in a situation such as that presented by 18 U.S.C. § 1952 where the basic offense may either be a felony or misdemeanor. In 18 U.S.C. § 371, for example, Congress provided a maximum penalty for conspiracy to violate a federal criminal statute of five years imprisonment and/or a $10,000 fine. But significantly, it declared:

> If, however, the offense, the commission of which is the object of the

conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The proportionality doctrine prohibits the imposition of excessive penalties; the graduation concept prevents expanding State misdemeanors into federal felonies by the mere use of interstate commerce facilities to violate State law, especially when the purpose of the federal law, expressly stated in the legislative history, is to assist local law enforcement in its enforcement of State laws.

Since Congress has failed to graduate the penalty provisions of 18 U.S.C. § 1952 in the manner it did in 18 U.S.C. § 371, this Court should declare that the excess penalty over and beyond that which is permissible under the basic State statute is unconstitutional and, in exercise of its supervisory jurisdiction over Federal judges,

it should require the judges charged with the duty of imposing sentences to limit the maximum penalty they impose to that which is permissible for the underlying State offense on which the Federal offense is based. *Accord, Stapf v. United States*, 367 F.2d 326, 329 (D.C.Cir., 1966), citing *Shelley v. Kraemer*, 334 U.S. 1 (1948). In the exercise of their discretion in sentencing, the Trial Courts have the power, hence the duty, to refrain from arbitrarily imposing excessive punishment on persons charged with violating 18 U.S.C. § 1952 and 18 U.S.C. § 371 in cases involving State misdemeanors.

It would seem appropriate to use this case as a vehicle to clarify the law in the above respect as it relates to the interaction of 18 U.S.C. § 1952 with State misdemeanor statutes. This Court should therefore grant certiorari for that purpose, and, following due proceedings herein, it

should reverse this cause and remand with instructions to modify petitioner's sentence so that it will not exceed the maximum punishment provided for the underlying State misdemeanor, La.R.S. 14:90.

CONCLUSION

For these reasons, a writ of certiorari should issue to the Court of Appeals for the Fifth Circuit to review the judgment and opinion rendered in these proceedings on April 19, 1973, *reh. den.* June 18, 1973.

Respectfully submitted,

MILTON P. MASINTER,
Attorney at Law
550 S. Broad Street
New Orleans, Louisiana
70119

JAMES A. MC PHERSON
Attorney at Law
419 Carondelet Street
New Orleans, Louisiana
70130

Attorneys for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1019

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK LEO VUCI,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

(April 19, 1973)

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1019

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK LEO VUCI,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 19, 1973, 5 Cir., 1973, ____ F.2d ____).

(June 18, 1973)

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

MINUTE ENTRY:
NOVEMBER 28, 1972
WEST, J.

(Title and Number Omitted)

* * * * *

This matter is once again before the Court, this time, on motion of the Defendant, Frank Leo Vuci, "To Vacate Judgment and to Dismiss Indictment or Correct Illegal Sentence." After reviewing this record once again, the Court concludes that no oral argument is required on this matter.

This defendant was tried before a jury in this Court and found guilty of four counts of violation of Title 18, U.S.C., Sections 371 and 1952. After the conviction this Court sentenced the defendant to five years and a $10,000 fine under Count 1, and to five years on each of Counts 2, 3, and 4, the latter three to run concurrently with the sentence imposed under Count 1. Thereafter, appeals were taken and applications ultimately filed

for writs with the United States Supreme Court. The conviction was affirmed and entered as mandate on April 26, 1972. On April 21, 1972, this defendant filed a motion for reduction of sentence, which motion was withdrawn on May 4, 1972. After that, on June 16, 1972, another motion was filed for reduction of sentence, and this Court, for written reasons assigned, denied that motion. On August 24, 1972, another motion for reduction of sentence, this time by way of a request for the Court to change the sentence and impose a sentence under Title 18, U.S.C., Section 4208(a), was filed. Once again, after another complete review of this record, this Court denied that motion. Now, on November 17, 1972, defendant once again files a motion as indicated above. Once again, the defendant's motion must be denied.

In the brief filed with the defendant's motion, defendant's counsel states that he

does not "challenge the legality of his conviction; nor does he claim a right to immediate release." Yet, in his prayer, he asks that the "judgment of conviction should be vacated and set aside and the indictment should be dismissed." It is not necessary, now, for this Court to comment on this inconsistency for the simple reason that the validity of the conviction has been tested through all of the Courts, including the United States Supreme Court, and the conviction has been upheld. There can simply be no further appeal from that conviction.

The main thrust, however, of the present motion is that the sentence imposed by this Court is illegal and unconstitutional because it "imposes a cruel and unusual punishment * * * grossly disproportionate to the offense charged." The argument is predicated mainly on the fact that the defendant was not really charged for violation of any federal anti-gambling law, but

rather for a violation of state law. Defendant argues that federal jurisdiction under Title 18, U.S.C., Section 1952 exists only when the gambling charged was a violation of state law. It is apparently the defendant's position that any sentence imposed for this federal violation which is greater than the sentence provided for by state law for a violation of the state anti-gambling statutes should be held unconstitutional as cruel and unusual punishment. Little need be said about this argument. Violation of Title 18, U.S.C., Section 371, a federal offense, carries with it a maximum sentence of $10,000 fine plus imprisonment for a period of five years. Violation of Title 18, U.S.C., Section 1952, a federal offense, carries with it a maximum sentence of $10,000 fine plus imprisonment for a period of five years. This is so because Congress has ordained it. Defendant was not convicted nor sentenced under state law. He was

convicted and sentenced for violation of federal law. There is simply no merit to the argument that either the maximum sentence provided by these statutes, or the sentence actually imposed by this Court, constitute cruel and unusual punishment. This defendant was found guilty, by overwhelming evidence, on one count of violation of Title 18, U.S.C., Section 371 (conspiracy), and on three counts, because of violations of state anti-gambling statutes, of violation of federal law as provided for by Title 18, U.S.C., Section 1952. As a result of these violations of federal law, the jury found this defendant guilty and thus subjected him to a maximum sentence of five years on each of the four counts, or a total possible punishment of twenty years plus a fine of $40,000. After due consideration of the record in this case, and after a thorough pre-sentence investigation was made, this Court allowed the

sentence imposed to run concurrently, and imposed the fine on only one of the four counts, thus, in effect, sentencing this defendant to only one-fourth of the sentence authorized by law. As the evidence indicated in this case, this was not, as suggested by counsel, a "petty offense of gambling." The evidence in the case would have justified the full extent of the punishment provided by law being imposed. Had this Court imposed the full sentence on each of the four counts, it would still not have granted a motion to reduce sentence. A fortiori, this Court must now deny the defendant's motion for a reduction of sentence. The sentence imposed by this Court was not lightly nor hastily imposed. It was imposed, in the first instance, after careful consideration of this entire record, and two previous motions for reduction in sentence have been denied after two additional, independent, careful reviews of

this record. Now, after a fourth careful review of this record:

IT IS ORDERED that defendant's motion for reduction of sentence once again be, and it is hereby DENIED, and

IT IS FURTHER ORDERED that defendant's motion to dismiss the indictment and/or to vacate the sentence previously imposed be, and it is hereby DENIED.

/s/ E. Gordon West
UNITED STATES DISTRICT JUDGE

CERTIFICATE

I certify that I have served the required number of copies of the foregoing Petition for a Writ of Certiorari on the Solicitor General of the United States, by United States Mail, first-class postage prepaid, this 19th day of July, 1973.

MILTON P. MASINTER
Attorney at Law

SUPREME COURT, U. S.
SEP 21 1973
MICHAEL RODAK, JR., CLERK

No. 73-150

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK LEO VUCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-150

FRANK LEO VUCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment.

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on three counts of having used interstate facilities to further illegal gambling and one count of conspiracy, in violation of 18 U.S.C. 1952 and 371. He was sentenced to four concurrent terms of five years' imprisonment and fined $10,000 on one of the counts. The court of appeals affirmed *per curiam* (450 F. 2d 940). A petition for a writ of certiorari was denied (405 U.S. 1064).

On June 16, 1972, petitioner filed in the trial court a motion for reduction of sentence, which was denied. On August 24, 1972, he filed another motion for re-

duction of sentence in the form of a request for sentencing under 18 U.S.C. 4208(a), which request was denied. The instant motion "To Vacate Judgment and to Dismiss Indictment or Correct Illegal Sentence" was filed in the trial court on November 17, 1972, and, after reviewing the entire record for the fourth time, the United States District Court for the Eastern District of Louisiana denied the motion (Pet. App. C). The court of appeals affirmed *per curiam* (Pet. App. A).

The facts underlying the original conviction are set out in detail in our brief in opposition to the earlier petition for a writ of certiorari to review the conviction, which was denied at 405 U.S. 1064. Briefly, those facts show that petitioner and others had been operating a gambling establishment for several years near Port Allen, Louisiana. The gambling consisted of bookmaking, card games, slot machines, and a large bingo operation, ostensibly sponsored by civic groups but in fact inuring to the personal benefit of petitioner and his partners. In the course of operations, they had to replenish the bingo equipment. In January 1967, petitioner mailed an order to a firm in Colorado for an electric bingo blower, which was delivered by common carrier in February 1967. In June 1967, petitioner ordered from the same firm four thousand bingo cards, a flashboard, and another blower, which were delivered by common carrier the same month. In January 1969, a co-defendant ordered from the same firm 1500 more bingo cards, which were shipped by air freight and brought to the club. F.B.I. agents executed a search warrant in January 1969 and seized eighteen telephones, betting slips, a sports blackboard ("tote board"), bingo equipment, and other gambling paraphernalia. Slot machines were removed by a local sheriff.

Petitioner contends that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. He maintains that the penalty imposed by Congress for use of a facility in interstate commerce to carry on a gambling operation cannot be greater than that which would be imposed by state law for the operation of a gambling establishment. This argument is without merit. The concern of Congress in enacting 18 U.S.C. 1952 was the widespread use of interstate facilities in connection with gambling and other illicit activities. See *United States* v. *Nardello,* 393 U.S. 282, 292. The legislative response was related to the gravity of the problem which Congress, not the states, perceived. A penalty of up to five years' imprisonment and a $10,000 fine is not unusual for crimes of this nature,[1] and it is not grossly disproportionate to the crime. *United States* v. *Gerhart,* 275 F. Supp. 443 (D. W. Va.).

Except where a sentence is illegal, such as where it exceeds the statutory maximum, a sentencing judge's exercise of discretion is not reviewable. *Gore* v. *United States,* 357 U.S. 386, 393; *Blockburger* v. *United States,* 284 U.S. 299, 305; *Gallagher* v. *United States,* 406 F. 2d 102, 109 (C.A. 8), certiorari denied, 395 U.S. 968. Here, the statutory maximum on each of the four counts was five years' imprisonment and a $10,000 fine, or a total in this case of twenty years' imprisonment and a $40,000 fine. Petitioner's sentence of five years' im-

[1] See 18 U.S.C. 1511, 1953, 1955, and 1961-1963.

prisonment and a $10,000 fine was well within the statutory limits.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[2] As noted by the district court (Pet. App. C-50):

> [T]his was not * * * a "petty offense of gambling." The evidence in the case would have justified the full extent of the punishment provided by law being imposed.